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In the

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 691

OSCAR R. BOLTON and LILLY BOLTON,
Appellants,

v.

BOROUGH OF SCHUYLKILL HAVEN,
Appellee.

On Appeal From the Superior Court
of Pennsylvania.

APPELLANTS' BRIEF CONTRA MOTION TO DISMISS APPEAL

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COUNTER-STATEMENT OF THE CASE.

The Appellants' Statement of the Case appears in the Jurisdictional Statement.

This counter-statement will be directed toward a few of the many inaccuracies in the Appellee's Brief:

(1) There was no allegation and no proof that the Appellee had received a "directive" from the Sanitary Water Board to construct the subject sewer system. If there was any such "directive," its contents were not made part of the record. The statement is entirely self-serving and extraneous to the record.

(2) The Borough was not only required to pay a fixed rental to the Authority, but was also obliged to pay all net revenues over and above the fixed charge as "additional rental." Section 2.04 (4) of the Contract and Lease so provides.

(3) Ordinance No. 321 was *not* adopted "to fulfill the mandate of the Sanitary Water Board," as Appellee states. There is nothing in the record to support that statement. On the contrary, the record shows that Ordinance No. 321 was adopted because the Borough had made a bargain with the Authority to do so.

(4) It is *not* true, as Appellee's statement says, that Notice of Appeal was filed "subse-

quently" to the refusal of four petitions for allocatur by the Supreme Court of Pennsylvania. The fact is, that Notice of Appeal was filed within 90 days from the refusal of the *first* petition. The remaining three petitions dealt with a jurisdictional question which will be more fully discussed in Part III of the following argument.

ARGUMENT

I. THERE IS ACTUALLY NO MOTION TO DISMISS BEFORE THE COURT.

Appellants were never served with any "Motion to Dismiss Appeal." The only document ever served on them was a *Brief* which bore the quoted words on its cover. That document does not contain any Motion. All it contains is a *Brief of Argument* in support of an alleged Motion. Furthermore, we are informed by counsel for Appellee that no Motion, as distinguished from the supporting Brief, was ever filed with the Clerk of the Court.

Rule 35 (1) of this Court provides:

> "Every motion to the Court shall state clearly its object and the facts on which it is based. A brief in support of the Motion (other than motions under Rule 31) may be filed therewith."

Thus, Rule 35 (1) itself points out the clear distinction between a "motion" and "A brief in support of the motion."

Furthermore, Rule 35 (2) provides:

> "Motions to the Court shall be filed with the clerk, with proof of service unless *ex parte* in nature."

We repeat, no "Motion to Dismiss Appeal," as

distinguished from a supporting Brief, was ever filed or served.

Consequently, Appellants are now in the peculiar position of being required to answer a Brief in support of an alleged Motion which was never served and which was never filed.

There is actually nothing before the Court, in the absence of a Motion properly served and filed. *The Brief of the Appellee should be stricken from the record.*

II. THE FEDERAL QUESTIONS ARE REAL AND SUBSTANTIAL, AND ARE NOT FORECLOSED BY ANY PRIOR DECISION OF THIS COURT.

A. The Stipulations of Record Squarely Admit That Ordinance No. 321 Was Adopted Pursuant to a Bargain With a Third Party and For the Financial Benefit of the Third Party.

The Appellee concedes in its argument that Ordinance No. 321 is invalid if it was adopted for the purpose of raising revenue. But the Appellee then proceeds to ignore, and tacitly repudiate, the solemn Stipulations made of record, which plainly admit the revenue-raising purpose.

Those stipulations were made at pre-trial conference (Transcript, pp. 50-60), and it was subsequently directed at trial that "the facts, as stipulated, shall be placed upon the record as to the verity and existence of the conditions" (Transcript, p. 66), and further, that the stipulations "would therefore raise the legal questions which are paramount in the issue here involved." (Transcript, p. 66).

We call the Court's attention to the following pertinent Stipulations:

"MR. STUTZMAN: Paragraph 14 of the New Matter: *'For the purpose of raising money sufficient to pay off the principal and interest of the Authority's Revenue Bonds* and sufficient

to pay the cost of operating and maintaining the Sewer System, the Authority and the Borough, and their respective officers and agents; by ordinances, compelled owners of abutting improved property to pay the cost of constructing, maintaining and operating the Sewer System *requiring said owners to connect their properties to said Sewer System* and compelling said owners to pay connection charges and sewer rentals under the penalties imposed by the ordinances'." (Transcript, p. 52)

* * * * *

"17. Under the provisions of Section 2.08 of said Contract and Lease (Plaintiff's Exhibit No. 1), *the Borough further agreed to require all owners of abutting improved property within the Borough to connect with the said Sewer System* and, in the event of the failure of any such property owner to pay any connection charge or sewer rent within a reasonable time, to the municipal liens therefor and to proceed to the collection thereof.

Paragraph 17 of the reply: 'Admitted'."
(Transcript, p. 54)

"18. The Borough's undertaking to compel connections with the Sewer System, as set forth in Section 2.08 of said Contract and Lease (Plaintiff's Exhibit No. 1), was agreed to by the Borough and the Authority *for the specific purpose and with the specific intent* of assuring the Authority and the holders of the Authority's bonds that the owners of abutting improved property would be compelled to pay sewer rentals and to contribute to the cost of constructing, maintaining and operating the

Sewer System *regardless of said owners' consent or desire to receive service provided by said Sewer System.*

Paragraph 18 of the reply: 'Admitted'."

(Transcript, p. 54)

* * * *

"20. Pursuant to and with intent to comply with Section 2.08 of said Contract and Lease (Plaintiff's Exhibit No. 1) *and with intent to execute the purpose of said Section 2.08 as hereinbefore alleged in paragraph 18 hereof, the Borough enacted its said Ordinance No. 321 (Plaintiff's Exhibit No. 3)* approved April 4, 1950, *requiring owners of improved property abutting on or adjoining said Sewer System to connect therewith, after due notice from the Borough to so connect,* under penalty of fine or imprisonment, and further forbidding said owners to dispose of their sewage by any other means, including the use of septic tanks."

(Transcript, p. 55)

The foregoing stipulations show clearly, unequivocally and beyond any possibility of denial that the Borough made a bargain with the lessor of the sewer to adopt Ordinance No. 321 and that *the Ordinance was adopted for the direct, immediate and primary purpose of taking the money of the abutting property owners without their consent and applying that money to the payment of the lessor's bonds.* The Appellee cannot be allowed to repudiate those stipulations.

B. The Stipulations and the Record Further Show That the Borough Requires the Property Owner to Express Contractual Consent Under Penalty of Fine or Imprisonment.

On this point, we call the Court's attention to the following further stipulation:

"Despite the provisions of Section VI of Ordinance No. 333, (Plaintiff's Exhibit No. 4) repealing all ordinances or parts of ordinances inconsistent with said Ordinance No. 333, the officers and councilmen of the Borough have continued to assert power, under Ordinance No. 321, (Plaintiff's Exhibit No. 3) to compel the owners of improved property abutting on said Sewer System to connect their properties to said System against their will and to accept the sewer services provided thereby, under penalty of fine or imprisonment, and said officers and councilmen have asserted and do assert power at the same time, under Ordinance No. 333, to prevent and forbid the property owner from complying with Ordinance No. 321, unless he first signs a contract to receive and pay for sewer service, as provided by Ordinance No. 333.

"Paragraph 23 of the reply: 'Admitted. For further answer it is averred that there is no inconsistency or incompatability between Ordinance No. 321 (Plaintiff's Exhibit No. 3) and Ordinance No. 333 (Plaintiff's Exhibit No. 4), nor in the respective requirements of each ordinance referred to in paragraph 23 of the answer'." (Transcript, pp. 56-57).

We further call the Court's attention to the form of Contract which the borough requires every property owner to sign; which was produced in Court by the Borough Solicitor (Transcript, p. 62); and which appears in the record as Deft's Exhibit No. 2. (Transcript, p. 78):

"Contract For Sewerage Service
Schuylkill Haven Borough
Schuylkill Haven, Pa.

Date 19

The Borough will extend its facilities and furnish service to the undersigned at premises located at said service used to be under rates.

Property owner shall pay for such service in accordance with rules, regulations, and rate schedules adopted by the Borough Council, or filed with the Public Utility Commission.

This contract shall became effective when signed by

Owner

Rep. of Sch. Haven Borough."

The document purports upon its face to be a "Contract." It contains contractual promises by both parties, and it must be signed by both parties before it becomes effective.

It should be noted that the "Contract" is entirely separate and distinct from the "Permit."

which appears in the record as Defendant's Exhibit No. 1 (Transcript, p. 77).

Thus, it clearly appears that the combined effect of Ordinances No. 321 and 333, and the administrative practice of the Borough, is to place the property owner in a dilemma. *Either he must relinquish his Constitutional rights to liberty of contract and freedom of speech by expressing contractual consent under duress of fine or imprisonment, or, if he stands upon his Constitutional rights and refuses to express contractual consent, he is not allowed to connect, and yet he is punished by fine or imprisonment for failure to connect.* Compare **WEST VIRGINIA STATE BOARD OF EDUCATION v. BARNETTE**, 319 U. S. 624, 630-631; 87 L. Ed. 1628, 1633.

C. The Federal Questions Are Not Foreclosed By Any Prior Decision of This Court.

None of the sewer connection cases cited by the Appellee have any relevance to, or bearing upon, the Constitutional questions arising from the admitted facts of the present case. There was nothing in the record of any of the cases cited by the Appellee to show that the legislation in question was adopted for any ulterior purpose.

In the present case, we have a flat and unqualified admission of the ulterior purpose. Furthermore, in the present case, we have the added element that the property owner is compelled, *under*

duress, to express *contractual consent* to a transaction forced upon him.

D. This Case Presents Real and Substantial Constitutional Questions of Due Process, Liberty of Contract and Freedom of Speech.

The admitted and stipulated facts show a bargain by a municipality to use its police power for the financial benefit of the other party to the bargain. The admitted and stipulated facts also show that Ordinance No. 321 was adopted "for the specific purpose" of taking the money of the abutting owners without their consent and applying it to the payment of the third party's debt.

This is a clear violation of the Due Process Clause of the Fourteenth Amendment. It is plain abuse of the police power. It is a plain attempt to use the police power as a guise for taking one man's property, without resort to the power of taxation, and giving it to another. As was aptly said by the Supreme Court of Pennsylvania in **WATERS v. WOLFE**, 162 Pa. 153, 172:

> ". . . that it (a legislative body) may not take one man's property to pay the debt of another against the consent of the owner, is . . . well settled."

The Appellee relies on the Pennsylvania Act of July 18, 1935, P.L. 1286, as amended by the Act of May 14, 1937, P.L. 630 (53 Purdon's Statutes, Section 2231 and 2232). But the Appellee fails to inform this Court that in **HAMILTON'S AP-**

PEAL, 340 Pa. 17, 16 A. 2d 32, the Supreme Court of Pennsylvania construed that very statute to mean exactly the opposite of Appellee's contention here. In **HAMILTON'S APPEAL**, the Court held that the charges authorized by the statute were *contractual* obligations, arising out of the express or implied *consent* of the property owner to use the sewer; that the statute did not authorize charges in the nature of taxes or as a substitute for taxes; and that if the charges were imposed *in invitum* they could not be sustained as contractual obligations.

It is very likely that it was this decision in HAMILTON'S APPEAL, *supra*, which prompted the Appellee to attempt to give some color of legality to its charges by forcing the property owner, *under duress of fine or imprisonment*, to sign a purported "Contract" expressing contractual consent to their payment.

This is a clear violation of liberty of contract. It is also a clear violation of a citizen's right to refuse to speak what is *not* in his mind: **WEST VIRGINIA STATE BOARD OF EDUCATION v. BARNETTE**, 319 U. S. 624, 633-634; 87 L. Ed. 1628, 1635.

Until this case arose, no American Court had ever held that legislative power could force a man *to express contractual consent against his will.* This requirement, contained in Ordinance No. 333 and insisted upon by the administrative practice of the Appellee, is an *unconstitutional*

clog upon the duty of connection imposed by Ordinance No. 321. Neither a State, nor an agency of a State, may impose conditions which require the relinquishment of rights protected by the Federal Constitution. **FROST v. RAILROAD COMMISSION**, 271 U. S. 583, 594, 70 L. Ed. 1101, 1105.

This Court has never hesitated to denounce the use of State legislative power as an instrument for circumventing Federal Constitutional rights, when the facts of the case made such purpose evident: **DOBBINS v. CITY OF LOS ANGELES**, 195 U. S. 223, 49 L. 169; **GOMILLION v. LIGHT FOOT**, —U. S.—, 5 L. Ed. 2d 110, 117.

Under the stipulated facts of this case, that is precisely the situation here, both as to the use of the police power as a guise for raising revenue for the benefit of a third party, and the further attempt to force a citizen *to express contractual consent under compulsion.*

III. RULE 13 (4) WAS STRICTLY COMPLIED WITH.

The judgment of the Superior Court of Pennsylvania was entered on August 10, 1959. Petition for Allocatur was presented to the Supreme Court of Pennsylvania on August 31, 1959, and refused by that Court on November 25, 1959. Notice of Appeal to this Court was filed on February 23, 1960. The timeliness of that Notice of Appeal has not been questioned.

Thereafter, the Superior Court of Pennsylvania decided in **COM. v. HANZLIK**, 191 Pa. Superior Ct. 460, 157 A. 2d 97, that it never had jurisdiction to review cases of the class to which the present case belongs.

That decision, of course, cast grave doubt on the jurisdictional validity of the judgment of the Superior Court in the present case. Accordingly, on April 20, 1960, Appellants petitioned the Superior Court to vacate its judgment for want of jurisdiction. On the same date, April 20, 1960, within the 60-day period permitted by Rule 13 (1), Appellants secured from Chief Justice Jones of the Supreme Court of Pennsylvania, where the record was lodged, an Order enlarging the time to perfect the appeal to this Court, "until the expiration of sixty days from the date of final determination by the Supreme Court of Pennsylvania of the jurisdictional validity of the judgment of the Superior Court appealed from."

On April 26, 1960, the Superior Court refused to vacate its judgment. On June 9, 1960, Appellants petitioned the Supreme Court of Pennsylvania for allocatur from that refusal of the Superior Court to vacate its judgment. The Supreme Court of Pennsylvania denied that petition, without opinion, on June 30, 1960. Two further efforts were made, on July 28, 1960, and on November 28, 1960, to have the Supreme Court of Pennsylvania make a definite ruling on the jurisdictional question. Those petitions were denied, again without an opinion, on September 30, 1960, and December 6, 1960. On February 3, 1961, the Jurisdictional Statement and Transcript of Record were filed in this Court.

The Order of Enlargement signed by Chief Justice Jones expressly granted "sixty days from the date of final determination by the Supreme Court of Pennsylvania of the jurisdictional validity of the judgment of the Superior Court appealed from." *The Supreme Court of Pennsylvania has never made any determination of the jurisdictional question.* In fact, the Supreme Court of Pennsylvania has *squarely recognized* that it had *never* decided the jurisdictional question, for, on January 14, 1961, that Court *denied* the Appellee's Petition to Dismiss Appeal to the United States Supreme Court, which raised the very same contention that Appellee advances here.

If the Appellee was dissatisfied with the refusal of its Petition, it had a remedy under Rule 14(3),

which it failed to follow. See **UNITED PUBLIC WORKERS v. MITCHELL**, 330 U. S. 75, 91 L. Ed. 754, which further holds that Rule 13 (1) is not jurisdictional. Be that as it may, the appeal in the present case was perfected within the time permitted by the Order of Enlargement, and therefore within the time permitted by Rule 13 (1).

CONCLUSION

(1) There is no "Motion to Dismiss Appeal" actually pending before this Court.

(2) The Federal Constitutional Questions squarely arise out of the facts stipulated of record. The questions are real and substantial, and have never been adversely decided by this Court.

(3) Rule 13 (1) was strictly complied with.

Appellants respectfully request your Honorable Court to hear this Appeal.

Respectfully submitted,

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